Owners of the Ship or Vessel Sasacom I v Bank Pembangunan Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–3588 OF 2010
ABDUL WAHAB PATAIL, ZAHARAH IBRAHIM AND MOHAMAD ARIFF JJCA
7 NOVEMBER 2014

Civil Procedure — Appeal — Record of appeal — Memorandum of appeal not dated — Whether both documents needed to be signed and dated — Whether there was compliance of r 18 of the Rules of the Court of Appeal 1994 — Whether record of appeal defective — Failure to include amended judgment in record of appeal

The respondent was vested with the rights and interests of Bank Industri & Teknologi Malaysia Bhd, which granted to the owners of the ship or vessel Sasacom I ('the appellant') a revolving bridge loan facility under a facility agreement. When the appellant allegedly defaulted in the loan repayments, the respondent commenced an admiralty action against Sasacom I which was subsequently arrested and later on, sank. This prompted the respondent to initiate a civil action to recover the outstanding amount from the appellant. In its defence, the appellant submitted that the revolving bridging loan was repaid by the assignment of sale proceeds from the construction of patrol boats in Iraq. In turn, the appellant counterclaimed against the respondent for a full account of the sale proceeds or proceeds under the letter of credit issued by the National Bank of Jordan which was assigned to the respondent by the appellant and for damages to be assessed for the sinking of the Sasacom I while under arrest. The High Court held in favour of the respondent and dismissed the appellant's counterclaims. Hence, the present appeal. The issue that arose was whether the appellant had filed a valid memorandum of appeal within the meaning of r 18 of the Rules of the Court of Appeal 1994.

Held, allowing the preliminary objection on first ground; dismissing the appeals with costs:

(1) The purpose of the provision in r 18 is to give the respondent the opportunity to prepare and respond to the grounds laid out in the memorandum of appeal. Only when a document is both signed and dated is it clothed with full legal existence and significance from its date. Since the document purporting to be the memorandum of appeal was undated, the respondent was entitled to doubt whether it was safe to rely upon it. A signed but undated memorandum of appeal failed to comply

with r 18. It was a breach of a fundamental rule and could not be excused in a court of justice. Compliance with the requirements of r 18 was therefore mandatory (see paras 12–13).

(2) Rule 18(4)(d) requires that a copy of the judgment, decree or order appealed from be filed in the record of appeal. That the copy of the judgment in the supplementary record of appeal was not the judgment of the court was acknowledged. The copy of the amended judgment was produced again improperly in the bundle of authorities. Production of the sealed order of the court appealed from in the record of appeal is a perennial problem. Its availability is not solely under the control of the appellant. This was recognised when Practice Direction No 1 of 1995 of the Court of Appeal was issued. Since as an alternative it is allowed to produce the judgment on the day of hearing itself, there was no merit in the ground of objection (see paras 16, 19–20 & 22).

[Bahasa Malaysia summary

Responden terletak hak dengan hak dan kepentingan Bank Industri & Teknologi Malaysia Bhd, yang memberikan kepada pemilik kapal Sasacom I ('perayu') kemudahan pinjaman titian pusingan di bawah perjanjian kemudahan. Apabila perayu didakwa mengingkari dalam pembayaran balik pinjaman, responden memulakan tindakan admiralti terhadap Sasacom I yang kemudiannya ditangkap dan selepas itu, tenggelam. Ini mendorong responden untuk memulakan tindakan sivil untuk mendapatkan semula jumlah tertunggak daripada perayu. Dalam pembelaannya, perayu berhujah bahawa pinjaman titian pusingan dibayar balik dengan penyerahan hak keuntungan jualan daripada pembinaan bot peronda di Iraq. Sebaliknya, perayu menuntut balas terhadap responden untuk akaun penuh keuntungan jualan atau keuntungan di bawah surat kredit yang dikeluarkan oleh National Bank of Jordan yang mana diberikan kepada responden oleh perayu dan untuk ganti rugi ditaksirkan untuk penenggelaman Sasacom I semasa di bawah tahanan. Mahkamah Tinggi memutuskan memihak responden dan menolak tuntutan balas. Maka, rayuan ini. Isu yang berbangkit adalah sama ada perayu telah memfailkan memorandum rayuan sah dalam maksud k 18 Kaedah-Kaedah Mahkamah Rayuan 1994.

Diputuskan, membenarkan bantahan awalan atas alasan pertama; menolak rayuan-rayuan dengan kos:

(1) Tujuan peruntukan k 18 adalah untuk memberi peluang kepada responden untuk menyediakan dan menjawab kepada alasan-alasan yang dinyatakan di dalam memorandum rayuan. Hanya apabila dokumen ditandatangani dan bertarikh ia dilitupi dengan kewujudan undang-undang penuh dan kepentingan dari tarikhnya. Memandangkan dokumen bertujuan untuk menjadi memorandum rayuan tidak bertarikh, responden berhak untuk mengesyaki sama ada ia adalah

selamat untuk bergantung ke atasnya. Memorandum rayuan yang bertandatangan tetapi tidak bertarikh gagal untuk mematuhi k 18. Ia adalah kemungkiran peraturan asas dan tidak dapat dikecualikan di mahkamah keadilan. Pematuhan dengan keperluan k 18 oleh itu adalah mandatori (lihat perenggan 12–13).

(2) Kaedah 18(4)(d) memerlukan salinan penghakiman, dekri atau perintah yang dirayukan difailkan di dalam rekod rayuan. Bahawa salinan penghakiman dalam rekod rayuan tambahan bukan penghakiman mahkamah diakui. Salinan penghakiman yang dipinda dikemukakan sekali secara tidak betul di dalam ikatan autoriti. Pengemukaan perintah yang dimeterai yang dirayukan di dalam rekod rayuan adalah masalah yang tidak ada kesudahannya. Kewujudannya bukan semata-mata di bawah kawalan perayu. Ini diterima apabila Arahan Amalan No 1 1995 Mahkamah Rayuan dikeluarkan. Memandangkan sebagai alternatif ia dibenarkan untuk mengemukakan penghakiman pada hari pendengaran itu sendiri, tiada merit dalam alasan bantahan (lihat perenggan 16, 19–20 & 22).]]]]

Notes

For cases on record of appeal, see 2 *Mallal's Digest* (5th Ed, 2015) paras 1826–1827.

Cases referred to

Dato Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad [2011] 1 MLJ 145; [2011] 1 CLJ 1, FC (refd)

Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad [2010] 1 CLJ 444, CA (refd)

Megat Naimuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645, FC (refd)

Legislation referred to

Federal Constitution art 152
National Language Act 1963/1967 s 8
Rules of the Court of Appeal 1994 rr 18, 18(2), 18(4)(d)

Appeal from: Suit No 22–80 of 2008-II (High Court, Kuching)

Kenny Yi (Yi & Co) for the appellant.
Albert Tang Yew Liong (Jong Yee Ling with him) (Albert Tang) for the respondent.

Abdul Wahab Patail JCA:

[1] By a vesting order dated 27 September 2005, the plaintiff Bank Pembangunan Malaysia Bhd ('the respondent') became vested with the rights

and interests of Bank Industri & Teknologi Malaysia Bhd which had granted to the defendant Owners of the ship or Vessel Sasacom I ('the appellant') under a facility agreement dated 9 February 2001 a revolving bridging loan facility for the aggregate amount of RM14,000,000.

[2] Asserting that the appellant defaulted in the loan repayments, the respondent commenced an admiralty action against Sasacom I. Sasacom I was arrested. While under arrest, it sank. Subsequently, the respondent commenced a civil suit to recover from the appellant the amount outstanding under the two loans.

[3] The appellant's defence was that the revolving bridging loan was repaid by the assignment of sale proceeds from the construction of six patrol boats in Iraq, and the respondent's claim is barred by limitation. The appellant counterclaimed against the respondent for a full account of all the sale proceeds or proceeds under the letter of credit issued by the National Bank of Jordan which was assigned to the respondent by the appellant.

[4] The appellant counterclaimed against the respondent for damages to be assessed for the sinking of the Sasacom I while under arrest.

[5] The High Court entered judgment for the respondent and dismissed the counterclaim by the appellant as follows:

(a) allowed the respondent's claim against the appellant in the consolidated suit with costs as follows:

(i) in respect of Admiralty In Rem No 27–02–2002–11, the appellant do pay the respondent RM4,487,572.54 with interest at 6% pa from 1 September 2002 until the date of judgment and thereafter 8% pa until full settlement of the admiralty action.

(ii) in respect of Suit No 22–80–2008-II, the appellant do pay the respondent RM7,604,417.11 with interest at 6% pa from 17 April 2004 until the date of judgment and thereafter at 8% pa until settlement for the suit action.

(b) dismissed the appellant's counter-claim in both actions (for the sum of RM6,116,714.58 for the overpaid amount to the respondent and for damages for loss of use of the sunken vessel).

[6] The appellant appealed to this court.

[7] On the date of hearing of the appeal on 18 October 2012, and after waiting all day, the parties requested the court to proceed to consider the appeal and deliver decision on another date on the basis of the written submissions. The date 28 November 2012 was set down for decision.

A PRELIMINARY OBJECTIONS

[8] Preliminary objections, notice of which were given on 11 October 2012, were raised by the respondent. These are in relation to the memorandum of appeal and the copy of the judgment in the supplementary record of appeal:

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(a) the memorandum of appeal is defective;

(b) the judgment is defective and is not the judgment;

(c) alternatively, the judgment is filed out of time and/or without leave.

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MEMORANDUM OF APPEAL

[9] The defect complained of is that the memorandum of appeal is undated.

D **[10]** Responding to the preliminary objection, it was submitted for the appellant as follows:

2.0 Defective Memorandum of Appeal as it is undated.

2.1 It is submitted that the objection is a technical objection.

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The Record of Appeal is dated as at The respondent are not prejudiced or misled due to the inadvertent error to date the Memorandum of Appeal.

[11] The issue is not whether the respondent was misled or prejudiced, but F whether the appellant had filed a valid memorandum of appeal within the meaning of r 18 of the Rules of the Court of Appeal 1994.

[12] It is trite if a document is neither signed nor dated, it is a draft. It follows if it is dated but not signed it is a draft nevertheless. But if it is signed but not G dated, it is signed but not intended to be in effect. It is at best a final draft. A party relying upon it takes the risk of the document being reneged upon. Only when a document is both signed and dated is it clothed will full legal existence and significance as from its date. Since the document purporting to be the memorandum of appeal is undated, the respondent is entitled to doubt H whether it is safe to rely upon it as the memorandum of appeal and commit the considerable time, effort and costs required to prepare and respond to the grounds set out upon findings of fact after a full trial.

[13] The purpose the provision in r 18 to file a memorandum of appeal is to I give the respondent the opportunity to prepare and respond to the grounds laid out in the memorandum of appeal. It is a fundamental rule of justice. The appellant cannot put forward without leave of the court any other ground: see r 18 sub-r (2). It is clear that a signed but undated memorandum of appeal fails to comply with r 18. The breach in this case is therefore a breach of a

fundamental rule and cannot be excused in a court of justice on the grounds of inadvertent error or on the assertion it does not prejudice the respondent.

[14] There is a plethora of cases that the compliance with the requirements of r 18 is mandatory. It is only necessary to refer here to *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad* [2010] 1 CLJ 444 (CA) it was held by the Court of Appeal that the memorandum of appeal was defective on the grounds that it was in the English language, unsigned and undated. An application for leave to appeal to the Federal Court upon the sole question of law whether the grounds of judgments of the Court of Appeal and that of the High Court, which were in the English language, are null and void, having regard to the provisions of art 152 of the Federal Constitution ('the Constitution') and s 8 of the National Language Act 1963/1967 ('the NLA 1963/67') was dismissed. There was no application for leave to appeal on the question of the memorandum of appeal being unsigned or undated (see *Dato Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad* [2011] 1 MLJ 145; [2011] 1 CLJ 1 FC).

[15] To accept as compliance with r 18 a memorandum of appeal that is undated would be to contradict the decision of the Court of Appeal in *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad*.

THE JUDGMENT

[16] The objections concern a further defect in the record of appeal to be filed under r 18. Rule sub-r 18(4)(d) requires that a copy of the judgment, decree or order appealed from be filed in the record of appeal.

[17] It was submitted for the respondent that:

> 3.1 The Judgment appealed against (contained in the appellant's Supplementary Record of Appeal dated 25 October 2010 at pp 1–2) is wrong and/or defective.
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> 3.2 There was an Amended Judgment (pursuant to Order of Court dated 20.3.2012), which was extended to the appellant/defendant vide our letter dated 27.6.2012 (Tab F of respondent's Supplementary BOA) and a transmission slip showing such successful transmission to the appellant/defendant is also evident in our activity report (Tab G of respondent's Supplementary BOA).
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> 3.3 Submit: This is not mere technicality or irregularity which is curable. By failing to include the Amended Judgment in the Record of Appeal, it means that there is no proper Judgment from the High Court that can be appealed against.

[18] It was submitted for the appellant that:

> 3.0 No Judgment/Defective Judgment

A 3.1 It is acknowledged by the appellant that the copy of the Judgment in the Supplementary Record of Appeal is an un-amended copy of the judgment.

It is not a case where a totally different copy of the judgment is enclosed in the Supplementary Record of Appeal as the respondent would like this court to believe.

B It is submitted that there is not much material differences between the un-amended and amended copy of the judgment. The differences between the un-amended copy of the judgment and the amended copy are as follows:

(1) amendment of the commencement of the interest on the sum of RM4,487,572.54 from 1st September 2001 to 1st September 2002;

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(2) amendment of the sum of RM7,604,417.11 to RM7,704,417.11 (a copy of the Amended Judgment is at TAB B of the appellant BOA)

The amendment does not change the character of the judgment.

D **[19]** That the copy of the judgment in the supplementary record of appeal is not the judgment of the court was acknowledged. We are not persuaded with the submission that the differences can be described as minor. The copy of the amended judgment was produced, again improperly in the bundle of authorities confirm the changes were limited to those year 2001 to 2002 and RM7,604,417.11 to RM7,704,417.11.

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[20] Production of the sealed order of the court appealed from in the record of appeal is a perennial problem. Its availability is not solely under the control F of the appellant. This is recognised when Practice Direction No 1 of 1995 of the Court of Appeal was issued. It provides:

Di bawah peruntukan kaedah 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu kes-kes rayuan di Mahkamah Rayuan.

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Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan. Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.

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Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam Mahkamah Terbuka. Pihak Penentang sewajarnya diberitahu di atas penyerahan ini.

I **[21]** See also *Megat Naimuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 (FC).

[22] Since as an alternative it is allowed to produce the judgement on the day of hearing itself, we find no merit in the ground of objection.

Conclusion

[23] Notwithstanding dismissal of the ground of objection on the copy of the judgment, the objection that the undated memorandum of appeal results in the record of appeal being defective remains valid.

[24] In *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir Mohamad*, the Court of Appeal struck out the unsigned undated purported memorandum of appeal in the English language and dismissed the appeal.

[25] We, therefore, allow the preliminary objection on the first ground, strike out the purported memorandum of appeal and dismiss the appeals with costs, fixed at RM10,000.

Preliminary objection allowed on first ground; appeals dismissed with costs.

Reported by Afiq Mohamad Noor